

***United States Court of Appeals  
for the Second Circuit***



**SUPPLEMENTAL  
BRIEF**



# 75-2039

B

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA, :  
ex rel., CLEVELAND HINES, :  
Petitioner-Appellant, :

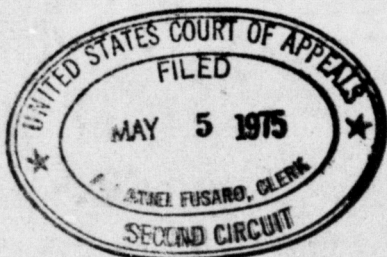
-against- :  
:

J. E. LA VALLEE, Superintendent, :  
Clinton Correctional Facility :  
Dannemora, New York, :  
Respondent-Appellee. :

Docket No. 75-2039

-----x  
SUPPLEMENTAL BRIEF FOR APPELLANT  
-----

ON APPEAL FROM AN ORDER OF THE  
UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK



JONATHAN J. SILBERMANN

Of Counsel

WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY  
Attorney for Appellant  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA, :  
ex rel, CLEVELAND HINES, :  
Petitioner-Appellant; :  
-against- :  
J. E. LA VALLEE, Superintendent, :  
Clinton Correctional Facility :  
Dannemora, New York, :  
Respondent-Appellee.:  
-----X

Docket No. 75-2039

---

---

SUPPLEMENTAL BRIEF FOR APPELLANT

---

---

ON APPEAL FROM AN ORDER OF THE  
UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the identification procedure used in this case was so unnecessarily suggestive as to give rise to a very substantial likelihood of irreparable misidentification and deny appellant due process.

STATEMENT OF FACTS

Immediately after being robbed and assaulted on July 13, 1972, in her car in the parking lot of the Bronx

Botanical Gardens, Mrs. Gareri went to the exit of the parking lot and reported the incident to the parking attendant (128). Mrs. Gareri could give only a general description of her assailant, limited to his approximate height, weight, age, and the fact that he had facial hair and wore a hat (32, 153, 171).

On July 14, Mrs. Gareri went to the 52d Precinct and examined hundreds of pictures, without identifying her assailant (29).

Four days later on July 18, appellant was arrested because he resembled the man who Mrs. Gareri had described (206). Later that day, Mrs. Gareri was telephoned by the arresting officer, Lieutenant Mitchell, and told that the police had the man that she had described (23, 173-174). On the evening of the 18th, Mrs. Gareri, in the company of Mitchell and without having seen appellant, signed a felony complaint charging appellant with rape, robbery, assault and possession of a weapon, on the representation by the police that the man they arrested bore the same description as given by Mrs. Gareri (24, 205-206).

On July 20, 1972, Mrs. Gareri and her husband met Mitchell in a police car near Fordham Hospital in the Bronx.

---

\* Numerals in parenthesis refer to pages of the state court pre-trial hearing and trial.

There Mrs. Gareri was shown fourteen or fifteen pictures (15) and asked if she could identify her assailant (15-16). Mrs. Gareri selected appellant's picture (18). However, appellant's photograph was the only picture of a man wearing a hat (31-32) (Appendix "C" at 4). On July 20, Mrs. Gareri attended a preliminary hearing where she observed appellant as he was brought into the court room to be seated at counsel table (177).

On August 7, 1972, the indictment upon which appellant was tried was filed in Bronx County.

Approximately four months later, a pre-trial hearing was held to determine inter alia whether any in-court identification of appellant by Mrs. Gareri should be suppressed based on appellant's contention that the photographic identification procedure was so suggestive as to be conducive to irreparable misidentification. Prior to the hearing, Mrs. Gareri was shown the spread of photographs earlier displayed to her by Officer Mitchell (35). The spread was conducted by the Assistant District Attorney in his office. Again, appellant's photograph was the only photograph of a man wearing a hat (31).

Appellant's wife testified at trial that she and appellant had no children.

APPELLANT'S APPLICATION PURSUANT TO  
28 U.S.C. §2254 and  
THE DISTRICT COURT OPINION

In his application pursuant to 28 U.S.C. §2254, appellant argued inter alia that the pre-trial photographic identification procedure was so unnecessarily suggestive as to taint Mrs. Gareri's in-court identification. By opinion dated December 26, 1974, the District Judge held that the photographic identification procedure was unnecessarily suggestive\* but rejected the contention that the procedure tainted the subsequent in-Court identification in light of the totality of the circumstances and factors outlined in United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970) and Neil v. Biggers, 409 U.S. 188 (1972).

ARGUMENT

THE IDENTIFICATION PROCEDURE  
USED IN THIS CASE WAS SO UN-  
NECESSARILY SUGGESTIVE AS TO  
GIVE RISE TO A VERY SUBSTAN-  
TIAL LIKELIHOOD OF IRREPAR-  
ABLE MISIDENTIFICATION AND  
DENY APPELLANT DUE PROCESS

---

\* Appendix "C" at 12. Though it is unclear whether Judge Carter found that the identification procedure was unnecessary and suggestive, his reliance on United States v. Evans, 484 F.2d 1178 (2d Cir. 1973)) and United States v. Fernandez, 456 F.2d 638 (2d Cir. 1971) and the fact that Phipps makes clear that the issue of the tainting of the in-Court identification need only be analyzed if the initial identification procedure was suggestive would indicate that, in fact, the Court found that the procedure employed in this case was unnecessarily suggestive.

The identification procedure used in this case was unnecessarily suggestive. As the District Court held, the police were not constrained by time and could have assembled a line-up near the time of appellant's arrest.\* See Simmons v. United States, 390 U.S. 377-384 (1968). Moreover, prior to Mrs. Gareri's identification, the police had told Mrs. Gareri they had the man who had attacked her. The fact that Mrs. Gareri accepted these assurances is evidenced by the fact that she was willing to swear to the charges lodged against appellant, on July 18, without having viewed or identified him. See Simmons v. United States, supra, 390 at 385. Thus, when she was shown the spread of photographs by Mitchell on July 20, Mrs. Gareri expected to find the picture of her assailant at that time.

Most importantly, the photographic spread shown to Mrs. Gareri was impermissibly suggestive, since appellant's photograph was distinctive in that it was the only one of an individual wearing a hat, a principal factor in Mrs. Gareri's description of her assailant.\*\* United States v. Evans, 484 F.2d 1178, 1185 (2d Cir. 1973); United States v. Fernandez, 456 F.2d 638, 641 (2d Cir. 1972).

---

\* Appendix "C" at 12.

\*\* The police could have easily remedied the fatal defect in the photographic spread by photographing appellant without any hat or including photos of others wearing hats.

Thus, the ultimate issue here is whether Mrs. Gareri identified appellant at trial as the man who she saw at the time of the crime or whether she was identifying the man whose photograph she had seen. United States ex rel. Gonzalez v. Zelker, 477 F.2d 797, 801 (2d Cir. 1973); United States ex rel. Phipps v. Follette, 428 F.2d 912, 915 (2d Cir. 1970). Precedent is of little value and each case must be decided on its peculiar facts. United States ex rel. Gonzalez v. Zelker, supra, 477 F.2d at 801; Simmons v. United States, supra, 390 U.S. at 384.

In the present proceeding, the very factors which rendered the photographic spread impermissibly suggestive, together with the whole chronology of events relating to the identification procedure created a substantial likelihood of misidentification. First, Mrs. Gareri demonstrated her susceptibility to suggestive procedures by accepting the police claim that they had arrested her assailant at face value, and signing a complaint against appellant without even observing him to determine whether he was in fact the individual who had assaulted her. See Simmons v. United States, supra, 390 at 385.

Moreover, Mrs. Gareri's description of her assailant included only general features and she had not demonstrated expertise for recalling the details of an individual's appearance. Compare Neil v. Biggers, supra. That appellant was arrested because he fit this general description, as would thousands of other New York area residents, only increased the likelihood that Mrs. Gareri would identify him as her assailant, regardless of whether this was in fact the case. This factor, coupled with Mrs. Gareri's demonstrated susceptibility to suggestiveness, her expectation that her assailant was among the individuals in the photographic spread, and the suggestive nature of the spread which impermissibly induced her to select appellant's photograph (see supra), all virtually compelled Mrs. Gareri to crystallize the details of appellant's features from his photograph as the features of her assailant. That this was in fact what happened is evidenced by the fact that prior to viewing appellant's photograph, Mrs. Gareri could not provide the police with more than a general description.

Subsequent events further aggravated the suggestiveness of the identification procedure and the likelihood

of misidentification. After viewing the photographic spread, Mrs. Gareri was brought to appellant's preliminary hearing where she viewed appellant, clearly the individual the police believed to be her assailant, being led into court and seated at counsel table. This was in essence a corporeal show-up similar to that condemned in United States v. Matlock, 491 F.2d 504, 506 (6th Cir. 1974). See also United States ex rel. John v. Casseles, 489 F.2d 20, 26 (2d Cir. 1973), serving only further to crystallize, in impermissibly suggestive fashion, appellant's features in Mrs. Gareri's mind as the features of her assailant.

Finally, the danger of Mrs. Gareri identifying appellant as the individual in the picture rather than the individual who assaulted her was substantially increased by the Assistant District Attorney's again showing of the suggestive spread of photographs to Mrs. Gareri immediately before the pre-trial identification hearing held on November 13, 1972 in conjunction with the trial itself. Thus, the interval between the last suggestive photographic showing and trial was minimal, enhancing the danger that Mr. Gareri was relying on her most recent photographic confrontation. United States ex rel.

Phipps v. Follette, supra, 428 F.2d at 915; United States v. Reid, Docket No. 74-2598, Slip op. , )2d Cir. April 24, 1975.)

Appellant submits that this continuing onslaught of impermissibly suggestive procedures from date of arrest to date of trial (compare Neil v. Biggers, supra) renders the factors surrounding Mrs. Gareri's observation of her assailant inadequate to rehabilitate her in-court identification of appellant. Experts have made clear that the length of time a victim views an individual who commits a violent crime like rape and robbery is not determinative of the ability to make an identification and illustrates the danger of a suggestive photographic identification procedure followed by a corporeal show-up:

In 1952, a man was identified by five people as the person guilty of a particular rape, robbery and kidnapping. Four of the five had seen the criminal for almost three hours, the fifth for almost six hours . . . The actual criminal, who bore no resemblance to the original suspect except that he too was a Negro, was later apprehended. The five witnesses had been shown a photograph of the original suspect before being asked to come in to identify him, and the corporeal identification procedure was a show-up.

(Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, 75, (1971))

Moreover, there was no corroborating evidence properly before the jury which would be sufficient to establish that there was no substantial likelihood of misidentification. United States ex rel. Gonzalez v. Zelker, supra, 477 F.2d at 803-4; see also Haberstroh v. Montanye, 493 F.2d 483, 485 (2d Cir. 1974); United States v. Reid, supra. The only potentially corroborative evidence was the arresting officer's claim that appellant had stated following his arrest that he had two children from an eleven year old marriage, and Mrs. Gareri's later confirmation that her assailant had described his matrimonial status in similar fashion. Since appellant's alleged statement was inadmissible under Miranda v. Arizona, 384 U.S. 436 (1966) (see appellant's main brief at Point I), it cannot be considered as corroborative of Mrs. Gareri's identification or appellant's guilt. United States ex rel. Gonzalez v. Zelker, supra, 477 F.2d at 803-4.\*

Moreover, even if that statement were admissible, it was contradicted by the testimony of appellant's wife that they had no children. Absent the impact of the tainted identification, the jury may well have found that the testi-

---

\* As was stated in United States ex rel. Gonzalez v. Zelker, supra, 477 F.2d at 803-4:

" . . . in determining whether or not the suggestive photographic identification procedure resulted in misidentification, we may properly consider the other factors which were before the jury and were properly admissible which tend to establish that there was not substantial likelihood of misidentification."

(Emphasis added.)



mony of appellant's wife created a reasonable doubt as to whether appellant was Mrs. Gareri's assailant.

Thus, appellant's in-court identification was the result of an unnecessarily suggestive identification procedure, a substantial likelihood of misidentification. The conviction was therefore improper and the writ should have been granted.

#### CONCLUSION

For the reasons set forth in this supplemental brief and appellant's main brief, the order of the District Court should be reversed and the writ of habeas corpus should issue, releasing appellant from custody unless the State re-tries him within sixty days.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY  
Attorney for Appellant  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

JONATHAN J. SILBERMANN

Of Counsel

April 25, 1975